(1)

No. 03129

In The

Supreme Court of the United States

DAVID WHITFIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner

QUESTIONS PRESENTED

1. Whether commission of an overt act is an essential element of a conviction under 18 U.S.C. § 1956(h), conspiracy to commit money laundering?

2. Whether the Supreme Court should resolve the split between the federal circuit courts on the issue of whether an overt act is an essential element of a conviction under 18 U.S.C. § 1956(h)?

3. Whether the district court abused its discretion in omitting an "overt act" element from its instruction on money laundering conspiracy?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, DAVID WHITFIELD ("Mr. Whitfield"), respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on November 10, 2003.

OPINIONS BELOW

The published opinion of the Eleventh Circuit Court of Appeals affirming Mr. Whitfield's money laundering conspiracy conviction on direct appeal is reproduced in Appendix A hereto and reported at *United States v. Hall*, 349 F.3d 1320 (11th Cir. 2003). The unpublished opinion of the Eleventh Circuit affirming all other counts of conviction as to Mr. Whitfield on direct appeal is reproduced in Appendix B hereto. The mandate issued by the Eleventh Circuit is reproduced in Appendix C. The judgment and commitment order entered by the United States District Court of the Middle District of Florida – TAMPA DIVISION, dated August 9, 2001, is reproduced in Appendix D.

JURISDICTION

The Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1). This petition presents this Court with a serious constitutional question as well as a conflict with decisions of the federal appellate and circuit courts as more fully presented below. The questions to be resolved center around whether an overt act is an essential element of a conviction under 18 U.S.C § 1956(h), money laundering

conspiracy statutes. The instant petition is filed timely and within the 90-day statutory time limitation period.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION: FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual services in time of war or public danger; nor shall any person be subject for the same offense twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18 U.S.C., SECTION 1956(h)

Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

STATEMENT OF CASE

I. Procedural History.

On March 10, 1999, a federal grand jury sitting in the Middle District of Florida indicted Mr. Whitfield,

HAYWOOD "DON" HALL ("Mr. Hall") and others for conspiracy to defraud, in violation of 18 U.S.C. § 371 (Count One); money laundering conspiracy, in violation of 18 U.S.C. § 1956(h) (Count Two); mail fraud, in violation of 18 U.S.C. §§ 1341 and 2 (Counts Three through Seven); money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (Counts Eight through Twelve); and conducting unlawful monetary transactions, in violation of 18 U.S.C. §§ 1957 and 2 (Counts Thirteen through Seventeen). Mr. Whitfield, Mr. Hall and several others pled not guilty and the case proceeded to trial by jury.

At the conclusion of the jury trial, all defendants moved for entry of a judgment of acquittal. The district court below granted the motion as to Count Five and denied it as to all other counts. On March 13, 2001, the jury returned guilty verdicts against Mr. Whitfield on Counts One through Four and Six through Seventeen. Mr. Hall was found guilty on Counts One, Two, Four, Six, and Seven. On August 9, 2001, the district court sentenced Mr. Whitfield to 235-months imprisonment and 3-years supervised release. On November 5, 2001, the district court entered an amended judgment and commitment order reflecting a determination of restitution in the amount of $85,030,412.00, to be paid jointly and severally by all defendants who went to trial, including Mr. Whitfield. He timely filed his notice of appeal from the amended judgment and commitment order entered by the district court below.

On November 10, 2003, the Eleventh Circuit Court of Appeals entered its decision in affirming the convictions of all defendants and vacating Mr. Hall's sentence and remanded to the lower court for further proceedings consistent with its opinion. *See, United States v. Hall*, 349

F.3d 1320 (11th Cir. 2003); App. A. The Eleventh Circuit issued a separate unpublished opinion regarding other issues raised by Mr. Whitfield and the other defendants. *See,* App. B.

On January 14, 2003, this Court granted Mr. Whitfield an enlargement of time to and including March 8, 2004, to file the instant petition. *See*, App. E. Mr. Whitfield is currently serving his federal sentence at FCC-Coleman (LOW), a federal correctional institution located in Coleman, Florida. The custodian is B. PEARSON, Warden.

II. Facts.

In 1993, Greater Ministries International, Inc. began running a "gifting" program, representing to potential "giftors" that they could double their "gifts" within seventeen months. Under the program, individuals "gifted" money to the Church in increments of $250. In return, over 17-months, the "giftor" was to receive a "giftback" of $500 for each $250 "gift." In 1997, Mr. Whitfield served as an executive board member and handled the day-to-day operations, along with other defendants, of Greater Ministries International Church ("GMIC"). Mr. Whitfield was an elder and had an office at GMIC headquarters. He initially was in charge of data entry of "gifting" certificates and the monies. Although there were disclaimers on the "gifting forms" stating that there were no guarantees of a return, the defendants expressly or impliedly promise giftbacks. GMIC took a loss of $20,000,000.00 on deposit with Best Bank financial institution, in July 1998 when it was taken over by the F.D.I.C. After that time, many investors received little or no return on their gifts. Mr. Whitfield received as "gas money" five percent commission of all money gifted or

re-gifted by an investor recruited by Mr. Whitfield. Over the course of the gift program, Mr. Whitfield received more than $678,000.00 in cash. GMIC was placed into bankruptcy in 1999. During the course of the bankruptcy proceedings, the bankruptcy trustee claimed that the gifting program executed by GMIC took in over $400,000,000.00.

At the conclusion of the jury trial, Mr. Whitfield, along with his co-defendants, requested that the jury be instructed that the commission of an overt act was an element of the money laundering conspiracy statute, 18 U.S.C. § 1956(h) under Count Two. The district court, over the defendants' objection, refused. The jury returned a guilty verdict under Count Two as to all defendants, including Mr. Whitfield.

On appeal, the Eleventh Circuit, recognizing a definitive split in the federal circuits on the issue whether an overt act was an element of § 1956(h), held that an overt act was not an element of that particular offense, § 1956(h). In so doing, the Eleventh Circuit held the trial court did not abuse its discretion in omitting an overt act element from the jury instruction for Count Two of the indictment. The instant petition followed, seeking this Court's intervention in order to resolve the split amongst the federal circuit courts on the aforementioned question of law.

REASONS FOR GRANTING THE PETITION

The Petitioner, Mr. Whitfield, respectfully submits that the Eleventh Circuit's holding that an "overt act is not an essential element for conviction of conspiracy to commit money laundering[,]" 349 F.3d 1324, was wrongly

decided as well as creating a definitive split amongst the federal circuit courts.

The Eleventh Circuit, relying on this Court's decision in *United States v. Shabani*, 513 U.S. 10, 115 S.Ct. 382 (1994), determined that the money laundering conspiracy statute, 18 U.S.C. § 1956(h), did not specifically call for an overt act requirement; thus, none was required to be proved as an "essential element for conviction of conspiracy to commit money laundering." *Hall*, 349 F.3d at 1323-24. In reaching this conclusion, however, the Eleventh Circuit noted "other circuits are split on the issue." 349 F.3d at 1323.

The appellate court below further held:

> While neither this Court nor the Supreme Court has determined whether commission of an overt act is an essential element of a conviction under § 1956(h), other circuits are split on the issue. *See, United States v. Godwin*, 272 F.3d 659, 669 n. 9 (4th Cir. 2001) (noting that 18 U.S.C. § 1956(h) does not explicitly require proof of an overt act); *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001) (finding that § 1956(h) does not require the indictment to allege an overt act). *But see, United States v. Wilson*, 249 F.3d 366, 379 (5th Cir. 2001) (finding proof of an overt act is required for a conviction under § 1956(h)); *United States v. Hildebrand*, 152 F.3d 756, 762 (8th Cir. 1998) (finding that § 1956(h) required proof of an overt act for conviction).

Those circuits courts that have found § 1956(h) to require proof of an overt act have relied on case law interpreting the general conspiracy statute

> of 18 U.S.C. § 371. *See Wilson*, 249 F.3d at 379; *Hildebrand*, 152 F.3d at 762.

Hall, 349 F.3d at 1323.

Although the Eleventh Circuit recognized the split, its list was not all inclusive; that is, another federal circuit has consistently held that an overt act was an essential element for conviction of conspiracy to commit money laundering. *See*, *United States v. Conley*, 37 F.3d 970, 976 (3rd Cir. 1994) and *United States v. Rankin*, 870 F.2d 109, 113 (3rd Cir. 1989).

In *Conley*, the Third Circuit concluded:

> In order to prove conspiracy to commit money laundering, the government must establish the following three essential elements: (1) the conspiracy, agreement, or understanding to commit money laundering was formed reached, or entered into by two or more persons; (2) at some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed one of the overt acts charged in the indictment in order to further or advance the purpose of the agreement; and (3) at some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement or understanding.

Conley, 37 F.3d at 976 (citing *United States v. Rankin*, 870 F.2d 109, 113 (3d Cir. 1989)). A panel in the Tenth Circuit agreed with the majority circuits on this issue and concluded that an overt act under the money laundering statute was an essential element for conviction of conspiracy to commit money laundering. *See*, *United States v.*

Hand, 1995 WL 743841, 76 F.3d 393 (10th Cir. 1995) (To prove a 18 U.S.C. § 1956(h) conspiracy, the government must prove: (1) the existence of an agreement; (2) to break the law; (3) an overt act; (4) in furtherance of the conspiracy's object; and (5) that a defendant willfully entered the conspiracy).

While the Eleventh Circuit in this case felt "compelled to follow the Supreme Court's reasoning in *Shabani*[ ]" in rejecting Mr. Whitfield's claim that the money laundering statute required proof of an overt act, other federal circuits, the majority of which have sided with Mr. Whitfield on this most important issue. In fairness to the Eleventh Circuit, the compelling aspect of the decision in *Shabani* was this Court's statement:

> [W]e find it instructive that the general conspiracy statute, 18 U.S.C. § 371, contains an explicit requirement that a conspirator "do any act to effect the object of the conspiracy." In light of this additional element in the general conspiracy statute, Congress' silence in [21 U.S.C.] § 846 speaks volumes.

Shabani, 513 U.S. at 14, 115 S.Ct. 382. Yet in reaching the opposite conclusion of the Eleventh Circuit in *Hall*, the other federal circuit courts applied the general conspiracy statute, 18 U.S.C. § 371. It is axiomatic that this Court should resolve the split amongst the federal circuits, or so Mr. Whitfield respectfully opines. Of course, as argued in the appellate court below, Mr. Whitfield submits that the Third Circuit's decision in *Conley* and *Rankin*, *supra*, the Fifth Circuit's decision in *Wilson*, *supra*, the Eighth Circuit's decision in *Hildebrand*, *supra*, and the Tenth Circuit's decision in *Hand*, *supra*, were all correctly decided, which this Court should affirm. The questions

presented here are purely issues of law which are being answered and applied differently throughout this country. In some circuits, in the absence of proof of an overt act, the conviction for conspiracy to commit money laundering cannot stand. On the other hand, if the defendant is charged in the Eleventh Circuit, for example, the government is not required to prove an overt act as an essential element for conviction of conspiracy to commit money laundering. *Hall*, 349 F.3d at 1324. This lack of uniformity in the law as applied to criminal defendants is a matter which deserves the attention of and resolution by this Court – nothing less. When considering the integrity of the criminal justice system, the government and the courts "should not be permitted 'to blow hot and cold'" on this issue. *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1951, 1856 (2000) (Souter, J., dissenting), by reinterpreting the money laundering conspiracy statute.

As to the claim that the district court erred in intentionally omitting, over Mr. Whitfield's objection, the overt act element from the § 1956(h) jury instruction, this Court has set forth the standard to be applied in cases like the one now before the Court. The test is whether it appears beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Chapman v. California*, 386 U.S. 18 (1967). Should this Court determine that the government was required to prove an overt act as an essential element for conviction under the money laundering conspiracy statute, the trial record reveals there is a substantial likelihood that the erroneous jury instruction aforementioned confused the jury. For the reasons stated above, Mr. Whitfield respectfully submits that this Court

should and must resolve the split in the federal circuits on this most important criminal matter.

CONCLUSION

WHEREFORE, the Petitioner, DAVID WHITFIELD, requests this Court to grant the instant petition for writ of certiorari, vacate the judgment of the Eleventh Circuit, and reverse his conviction for conspiracy to commit money laundering. Mr. Whitfield further requests other relief this Court deems proper and just.

Respectfully submitted,

DAVID WHITFIELD
P.O. Box 1031
Coleman, FL 33521-1031

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14746

D.C. Docket No. 99-00078-CR-T-25F

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERALD PAYNE,
BETTY PAYNE,
PATRICK TALBERT,
DAVID WHITFIELD,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(November 10, 2003)

Before BLACK and FAY, Circuit Judges, and HUCK*, District Judge.

* Honorable Paul C. Huck, United States District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

Defendants Gerald Payne, Betty Payne, David Whitfield ("Whitfield"), and Patrick-Henry Talbert ("Talbert") were convicted of mail fraud conspiracy, in violation of 18 U.S.C. § 371; money laundering conspiracy, in violation of 18 U.S.C. § 1956(h); mail fraud, in violation of 18 U.S.C. § 1341; money laundering, in violation 18 U.S.C. § 1956(a)(1)(A)(i); and conducting unlawful monetary transactions, in violation of 18 U.S.C. § 1957.[1] In addition, Defendant Gerald Payne was also convicted of unlawfully structuring financial transactions, in violation of 31 U.S.C § 5324(3). These convictions were based on government allegations that these co-defendants, as principals in Greater Ministries International Church (GMIC), managed and promoted a fraudulent investment scheme.

Defendant Gerald Payne initially incorporated GMIC and began to use this "church" as a vehicle to defraud investors by setting up a "gifting" program, which the other co-defendants eventually became involved in. Under the program, investors would "gift" money to GMIC in increments of $250 and within 17 months the "giftors"

[1] Two other original co-defendants, James R. Chambers and Andrew J. Krishak, accepted plea agreements for their role in the crime. Additionally, one other co-defendant, Haywood Eudon Hall, was convicted of mail fraud conspiracy, money laundering conspiracy, and mail fraud. We have written an opinion discussing two of Hall's challenges: (1) whether proof of an overt act is necessary for a money laundering conspiracy conviction under 18 U.S.C. § 1956(h); and (2) whether an abuse of trust sentencing enhancement was proper under U.S.S.G. § 3B1.3. Accordingly, although we are aware that some of the other co-defendants have adopted Hall's first challenge, we do not further discuss this issue here.

were to get back double their money in the form of "giftbacks." Although there were disclaimers on the "gifting forms" stating that there were no guarantees of a return, the defendants expressly or impliedly promised giftbacks. Notwithstanding the defendants' promises of large amounts of money, many investors received little or no return on their gifts. When giftors inquired about their money, the defendants employed stalling techniques. In contrast, each director received monthly "gas money," which was a five percent commission of all money gifted or re-gifted by an investor recruited by that director. All gas money was paid in cash by Defendant Gerald Payne, and over the course of the fraud, he received more than $310,000 of this money, while Defendant Whitfield received more than $678,000, and Defendant Talbert received more than $609,000.

These co-defendants now raise various challenges to their convictions and sentencing. First, as to Defendant Gerald Payne, he claims that he was effectively precluded from testifying on his own behalf due to the district court's failure to apply the proper weighing test in ruling that his prior conviction was admissible under Federal Rule of Evidence 609(b).

Defendant Betty Payne next suggests three other issues: (1) the district court committed reversible error in denying a motion for mistrial based upon the government's introduction of testimony from a witness not on the government's witness list; (2) the district court committed reversible error in denying a motion for mistrial after the jury witnessed Defendant Talbert escorted into the courtroom through a side security door by United States Marshals; and (3) the district court committed reversible error in denying a motion for mistrial after the government

entered an exhibit the defense claims was prejudicial and irrelevant during the cross-examination of witness Barbara McMannus.

Defendant Whitfield makes four additional challenges: (1) the government did not present sufficient evidence to support a verdict against him; (2) the district court abused its discretion in admitting a transcript of his grand jury testimony into evidence with certain exculpatory statements redacted; (3) the district court erroneously increased his offense level under the Sentencing Guidelines for occupying a managerial or supervisory role in the offense; and (4) the district court abused its discretion in ordering restitution and then in determining the amount imposed.

Finally, Defendant Talbert raises ten issues: (1) the district court lacked jurisdiction; (2) venue in the district court was improper; (3) the government did not present sufficient evidence to support a verdict against him; (4) the district court denied him his rights under the United States Constitution; (5) the district court erroneously allowed foreign agents from the Internal Revenue Service to be seated with the government attorneys; (6) the district court erred in not recognizing the State's jurisdiction over the subject of religion and not recognizing Defendant Talbert's rights under the United States Constitution, including the First Amendment; (7) the district court erred in not providing Defendant Talbert with his Constitutional *Miranda* rights; (8) he was not represented by competent counsel at trial; (9) the district court judge did not act in accordance with his oath to support the United States Constitution; and (10) the government did not act in accordance with the United States Constitution during the prosecution of his case.

In addition to the above arguments, we are aware that some of the defendants have adopted issues raised by other co-defendants; accordingly, we do not mean to limit each defendant to the specific issues set forth above. Nevertheless, after carefully reviewing the trial record and the briefs submitted by the parties, and after considering oral argument, we find no merit to any of the defendants' contentions. We therefore affirm the convictions and sentences with regard to all defendants.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA — CASE NUMBER: 8:99-CR-78-T-27MSS

vs.

DAVID WHITFIELD: Defendants Attorney: Daniel Daly (standby counsel)

___ pleaded guilty to count(s).
___ pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1 through 4, and 6 through 17 after plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
18 § 371	Conspiracy to commit Mail Fraud, Wire Fraud, and To Transport Property Taken by Fraud Across State Lines	1/99	One
18 § 1956(h)	Conspiracy to Commit Money Laundering	1/99	Two
18 § 1341	Mail Fraud	3/16/96	Three
18 § 1341	Mail Fraud	10/15/96	Four
18 § 1341	Mail Fraud	11/13/96	Six
18 § 1341	Mail Fraud	5/14/98	Seven

18 § 1956 (a)(1)(A)(i)	Money Laundering	4/26/95	Eight
18 § 1956 (a)(1)(A)(i)	Money Laundering	5/18/95	Nine
18 § 1956 (a)(1)(A)(i)	Money Laundering	5/23/95	Ten
18 § 1956 (a)(1)(A)(i)	Money Laundering	6/7/95	Eleven
18 § 1956 (a)(1)(A)(i)	Money Laundering	6/20/95	Twelve
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	1/25/95	Thirteen
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	5/3/95	Fourteen
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	5/31/95	Fifteen
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	6/27/95	Sixteen
18 § 1957	Unlawful Monetary Transactions Derived from Mail Fraud	7/12/95	Seventeen

The defendant is sentenced as provided in pages 3 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

___ The Defendant has been found guilty on count(s)
___ Count(s) *(is)(are) dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:	358-38-3363
Defendant's Date of Birth:	04/30/52
	Date of Imposition of Sentence: 8/09/01
Defendant's USM No:	38297-018
Defendant's Mailing Address:	c/o U.S. Marshall
Defendant's Residence Address:	c/o U.S. Marshall

JAMES D. WHITTEMORE
U.S. DISTRICT JUDGE
DATE: November 5, 2001

Defendant: DAVID WHITFIELD
Case No: 8:99-CR-78-T-27MSS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of TWO HUNDRED THIRTY-FIVE (235) MONTHS. Said term to consist of SIXTY (60) MONTHS as to Counts 1, 3, 4, 6, and 7, all terms to run CONCURRENTLY to each other; TWO HUNDRED THIRTY-FIVE (235) MONTHS as to Counts 2, 8, 9, 10, 11, and 12, all terms to run CONCURRENTLY to each other and CONCURRENT to Counts 1, 3, 4, 6, and 7; SIXTY (60) MONTHS as to Counts 13, 14, 15, 16, and 17, all terms to run CONCURRENTLY with each other and CONCURRENT with Counts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, and 12.

__X__ The Court makes the following recommendations to the Bureau of Prisons: The court recommends confinement at Coleman.

__X__ The defendant is remanded to the custody of the United States Marshal.
_____ The defendant shall surrender to the United States Marshal for this district.

_____ at ___ a.m./p.m. on ___.
_____ as notified by the United States Marshal.

_____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

_____ before 2 p.m. on ___.
_____ as notified by the United States Marshal.
_____ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 12/5/2001 to FCC Coleman at Coleman – LOW, with a certified copy of this judgment.

J.M. Killian, Warden
By: Melody Rodgers, LIE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS** as to Counts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 – **CONCURRENT.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

_ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

____ The defendant shall participate in the Home Detention program for a period of ___. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

____ The defendant shall participate, as directed by the Probation Officer, in a program (outpatient and/or impatient) for treatment of narcotic addiction of drug or alcohol dependency. This program may include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Officer's Sliding Scale for Mental Health Treatment Services.

__X__ The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, acquisitions or obligating himself for any major purchases without approval of the probation officer.

X The defendant shall provide the probation officer access to any requested financial information.

X The defendant shall perform 400 hours of community service during each year of supervision on such terms as directed by the probation officer. This community service may be substituted on an hourly basis for gainful employment where he is paid a wage, other than in the capacity of minister, pastor, or other religious leader.

___ The defendant shall refrain from engaging in any employment related to financial investing involving charitable or religious causes without the express permission of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Total Restitution
Totals:	$1600.00	$Waived	$85,030,412.00

_____ The determination of restitution is will be determined ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

X The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order of percentage payment column below. However, pursuant to 18

U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Amount of Restitution Ordered
Victims Identified in Court Exhibit #1	$85,030,412*

*To be made jointly and severally with co-defendants Gerald Payne, Betty Payne, Patrick Talbert, and Haywood Eudon Hall.

To the extent that any victim receives compensation as a result of the bankruptcy proceedings, each victim's loss amount shall, for purposes of this Order of restitution, be reduced by the amount so recovered, pursuant to 18 U.S.C. § 3664(f)(2)(A).

(See Court's Order dated November 5, 2001, attached)

____ If applicable, restitution amount ordered pursuant to plea agreement $_____.

____ The defendant shall pay interest on any fine or restitution of more than $2,500, unless fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

____ The court determined that the defendant does not have the ability to pay interest, and is ordered that;

_____ The interest requirement is waived for the ___ fine and/or ___ restitution.

_____ the interest requirement for the ___ fine and/or restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. ____ Lump sum payment of $___ due immediately, balance due
___ not later than _____, or
___ in accordance with ___ C, ___ D, or ___ E below; or

B. ____ Payment to begin immediately (may be combined with ___ C, ___ D, ___ E below); or

C. ____ Payment _____ (e.g., equal weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g. months or years), to commence _____ days (e.g. 30 or 60 days) after date of this judgment; or

D. ____ Payment in _____ (e.g. equal, weekly, monthly, quarterly) installments of $_____ over a period of ___, (e.g., months or years) to commence ___ after release from imprisonment to a term of supervision; or

E. _X_ Special instructions regarding the payment of criminal monetary penalties: the Defendant shall immediately begin making nominal payments pursuant to 18 U.S.C. § 3664(f)(3)(B) and shall participate in the Bureau of Prisons' Inmate Financial Responsibility Program.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a

period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

____ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

____ The defendant shall pay the cost of prosecution.

____ The defendant shall pay the following court cost(s):

____ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14746

D.C. Docket No. 99-00078-CR-T-25F

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAYWOOD EUDON HALL,
a.k.a. Don Hall,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(November 10, 2003)

Before BLACK and FAY, Circuit Judges, and HUCK*, District Judge.

FAY, Circuit Judge:

In March 1999, Defendant, Haywood Eudon Hall ("Hall"), was charged in 17 counts of a 20 count indictment

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* Honorable Paul C. Huck, United States District Judge for the Southern District of Florida, sitting by designation.

along with six co-defendants.[1] The government alleged that Hall and the co-defendants, as principals in Greater Ministries International Church (GMIC), managed and promoted a fraudulent investment scheme. Hall was subsequently convicted of five counts: mail fraud conspiracy, money laundering conspiracy, and three counts of mail fraud. In this appeal he raises various challenges to both his convictions and sentencing. Hall first argues that the district court erred in not requiring the jury to find proof of an overt act to support his conviction for conspiracy to commit money laundering under 18 U.S.C. § 1956(h). Since we find that proof of an overt act is not an essential element under § 1956(h), we affirm Hall's money laundering conspiracy conviction. Hall also claims that the district court erroneously applied a two-level increase to his sentence pursuant to U.S.S.G. § 3B1.3 for abuse of position of trust due to his status as a pastor. We conclude that Hall did not occupy a position of trust under the Sentencing Guidelines, and therefore reverse this sentence enhancement.[2]

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[1] Two co-defendants, James R. Chambers and Andrew J. Krishak, accepted plea agreements for their role in the crime. The other four co-defendants, Gerald Payne, Betty Payne, David Whitfield, and Patrick Talbert, were found guilty on all counts charged against them (except that Count Five was dismissed with respect to all defendants on a motion for judgment of acquittal). These four defendants appeal their convictions and sentences on various grounds, and some have also adopted issues raised by co-defendants; however, we find no merit to any of the issues not discussed in this opinion and they do not warrant discussion.

[2] We are aware that Hall argues the government failed to present sufficient evidence to support any of his convictions and that he has also adopted issues raised by co-defendants; however, we find no merit in any of these issues and they do not warrant discussion.

I.

In early 1996, Hall joined GMIC as a director and pastor of the church, and also became head of its World Missions program. When Hall came to GMIC, he became involved in the "gifting" program that had been started by one of the co-defendants, Gerald Payne. Though the name of the program changed from the "Double Your Money Program," to the "Double Your Blessings Program," and finally to the "Faith Promises Program," the gifting program remained essentially the same throughout its life. Under the program, investors would "gift" money to GMIC in increments of $250 and within 17 months the "giftors" were to get back double their money in the form of "gift-backs."

Hall and some of the other defendants held "road-show" meetings across the country to promote the program. Despite using religious rhetoric to encourage participation in the program, the main focus of the meetings was on how much money could be made. Although there were disclaimers on the "gifting forms" stating that there were no guarantees of a return, the defendants expressly or impliedly promised giftbacks. The defendants told the giftors that profits were generated through investments in mining for precious metals and gems, in offshore commodities and drilling, and in overseas banks that paid high interest rates. Aside from being led to believe that they would get back double their money, potential investors were also told that some of the profits generated would go to feed the homeless, rehabilitate drug addicts, and support missionaries.

However, GMIC never had any of the assets the defendants claimed to be investing in. There is no record of

GMIC or any one of the defendants having gold, silver, or diamond mines in the United States from 1978 to the present. In addition, the diamond and gold mines GMIC was supposed to be operating in Liberia never did fully get off the ground. Although a diamond mine there produced tiny industrial grade diamonds of little value, the gold mines were never even operational. GMIC, however, did buy gold and silver and then had a company mint gold and silver medallions with the GMIC logo on them in order to promote the gifting program to potential giftors and to appease already dissatisfied investors.

Furthermore, the GMIC office supposedly located in the Cayman Islands never existed. Similarly, the Greater International Bank of Nauru was merely a storefront inside GMIC's Tampa building. No money was ever deposited into the Bank of Nauru, as giftbacks were deposited purely on paper by the giftors through couriers. Giftors were encouraged to make their gifts through these courier services, and this made it especially easy for already participating investors to "re-gift" their giftbacks, or deposit them in this "offshore bank," without ever seeing the cash, thus allowing the defendants to perpetrate their fraud. If a giftor, however, still wanted to withdraw money from his account, the bank representative, a GMIC gospel singer, would have to go directly to Defendant Payne to get money or gold.

Notwithstanding the defendants' promises of large amounts of money, many investors received little or no return on their gifts. When giftors inquired about their money, the defendants employed stalling techniques. Moreover, despite the defendants' claims that giftors' investments were going to charity, only about one percent of this money went to charitable purposes. In contrast,

each director received monthly "gas money," which was five percent commission of all money gifted or re-gifted by an investor recruited by that director. All gas money was paid in cash by Defendant Payne, and over the course of the fraud, Hall received more than $539,000 of this money.

II.

Hall first claims that the district court erred in refusing to instruct the jury that proof of an overt act was necessary to convict him under 18 U.S.C. § 1956(h) for conspiracy to commit money laundering. Although this Court reviews a refusal to give a requested jury instruction for abuse of discretion, *United States v. Condon*, 132 F.3d 653 (11th Cir. 1998), if the refusal was based on an error of law, then it is by definition an abuse of discretion. *United States v. Govan*, 293 F.3d 1248, 1250 (11th Cir 2002). While neither this Court nor the Supreme Court has determined whether commission of an overt act is an essential element of a conviction under § 1956(h), other circuits are split on the issue. *See United States v. Godwin*, 272 F.3d 659, 669 n.9 (4th Cir. 2001) (noting that 18 U.S.C. § 1956(h) does not explicitly require proof of an overt act); *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001) (finding that § 1956(h) does not require the indictment to allege an overt act). *But see United States v. Wilson*, 249 F.3d 366, 379 (5th Cir. 2001) (finding proof of an overt act is required for a conviction under § 1956(h)); *United States v. Hildebrand*, 152 F.3d 756, 762 (8th Cir. 1998) (finding that § 1956(h) requires proof of an overt act for conviction).

Those circuit courts that have found § 1956(h) to require proof of an overt act have relied on case law interpreting the general conspiracy statute of 18 U.S.C.

§ 371. *See Wilson*, 249 F.3d at 379; *Hildebrand*, 152 F.3d at 762. Section 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons **do not act to effect the object of the conspiracy**, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (emphasis added). It is important to note that § 371 expressly requires proof of an overt act in furtherance of the conspiracy to establish violation of the statute. However, the money laundering conspiracy statute, 18 U S.C. § 1956(h), does not contain this express language:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1956(h). In this respect, the language of § 1956(h) is not like § 371, but instead is nearly identical to the drug conspiracy statute, 21 U.S.C. § 846. *See Tam*, 240 F.3d at 802; *United States v. Threadgill*, 172 F.3d 357, 366 n.5 (5th Cir. 1999). Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 846. The Supreme Court, recognizing that the language of § 846 does not call for an overt act, refused to infer an overt act requirement into the statute. *United States v. Shabani*, 513 U.S. 10, 13 (1994). In reaching this conclusion, the Supreme Court compared the language of 21 U.S.C. § 846 to that of 18 U.S.C. § 371:

> [W]e find it instructive that the general conspiracy statute, 18 U.S.C. § 371, contains an explicit requirement that a conspirator "do any act to effect the object of the conspiracy." In light of this additional element in the general conspiracy statute, Congress' silence in § 846 speaks volumes.

Id. at 14. Since the language of the statute at issue here, 18 U.S.C. 1956(h), is nearly identical to 21 U.S.C. § 846, we are compelled to follow the Supreme Court's reasoning in *Shabani*. Given the absence of any language in § 1956(h) requiring proof of an overt act, we find that an overt act is not an essential element for conviction of conspiracy to commit money laundering. Accordingly, the jury instructions approved by the district court were indeed proper.

III.

Hall next contends that the district court erroneously enhanced his sentence under U.S.S.G. § 3B1.3 for abuse of position of trust due to his status as a pastor. Pursuant to the Sentencing Guidelines, this two-level increase is appropriate "[i]f the defendant abused a position of public or private trust, ... in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. In order for the district court to have applied this increase, two elements must have been

established: (1) that the defendant occupied a position of public or private trust; and (2) that the defendant abused that position in a significant way to facilitate the commission or concealment of the offense. *United States v. Garrison*, 133 F.3d 831, 837 (11th Cir. 1998). "We review the district court's fact findings for clear error, but its determination whether the facts justify an abuse-of-trust enhancement we review de novo." *United States v. Ward*, 222 F.3d 909, 911 (11th Cir. 2000) (quotation marks and citation omitted). Although we accept the district court's finding of fact with regard to Hall's status as a pastor, we conclude that this fact alone is insufficient to support a determination that Hall occupied a position of trust with respect to the victims.

In finding that Hall's status as a pastor put him in a position of trust, the district court did not indicate whether it found Hall to have occupied a position of public trust or of private trust. Nevertheless, it is of no consequence as to whether we analyze this as a private or public trust, for we find the evidence in the record to be insufficient to support a finding that the relationships, if any, between Hall and the victims were of the type to put Hall in any position of trust under the Sentencing Guidelines. Within the context of fraud, this Court has found a position of trust to exist in two instances: "(1) where the defendant steals from his employer, using his position in the company to facilitate the offense, and (2) where a fiduciary or personal trust relationship exists with other entities, and the defendant takes advantage of the relationship to perpetrate or conceal the offense." *Garrison*, 133 F.3d at 837-38 (quotations omitted). This case can only fall within the second situation. However, since the government does not allege the existence of a fiduciary

relationship, to conclude that Hall occupied a position of trust we must find a "personal trust relationship" between Hall and the victims.

Hall's status as a pastor does not necessarily create a personal trust relationship between himself and the victims.[3] *See United States v. Morris*, 286 F.3d 1291, 1297 (11th Cir. 2002). *See also United States v. Caplinger*, 339 F.3d 226, 236-38 (4th Cir. 2003) (finding that defendant's representation as a physician did not by itself mean he occupied a position of trust). In *Morris*, though the defendant was represented as an attorney to investors in an investment fraud scheme, he was found not to have abused a position of trust. *See id.* at 1296-97. This Court explained:

> [I]t simply is not the case that an attorney holds a position of trust with respect to all people with whom he comes into contact solely by virtue of his status as an attorney. Morris did not have an attorney-client relationship with any of the victims. Although Morris' status as an attorney may have been used to develop the trust of the victims, there are no facts to support the conclusion

[3] The district court cites the Seventh Circuit case, *United States v. Lilly*, 37 F.3d 1222 (7th Cir. 1994), as being instructive in determining that Hall occupied a position of trust by virtue of his status as a pastor. Although *Lilly* dealt with an investment fraud scheme by a pastor, the *Lilly* court specifically found that "regardless of the position Pastor Lilly held with respect to the non-Church member investors, the Pastor undoubtedly held a position of trust within the Church." *Id.* at 1227. However, since all the victims presented by the government in this case were non-church member investors, the district court's reliance on *Lilly* is misplaced.

> that as an attorney Morris occupied a position of trust in relation to these victims.

Id. at 1297. As in *Morris*, the government concedes that there is no evidence in the record indicating that Hall had a pastor-clergy relationship with any of the victims. Although Hall may have used his status as a pastor to develop the trust of investors, this does not demonstrate that Hall created a personal trust relationship with any of the victims. The government claims that evidence of Hall espousing religious rhetoric at the roadshow meetings is sufficient to establish this relationship. However, we must be careful to "distinguish between those arms-length commercial relationships where trust is created by the defendant's personality or the victim's credulity, and relationships in which the victim's trust is based on defendant's position in the transaction." *Garrison*, 133 F.3d at 838 (citations omitted). Since Hall and the other elders traveled across the country, these meetings were not regularly held in one locality, and listening to a meeting over the course of a few hours is not enough to establish the type of relationship contemplated by the Sentencing Guidelines. The government attempts to equate Hall's speeches at these meetings with the type of preaching a pastor engages in with members of his church at regular church services. These roadshow meetings, however, were not regular church services, and the government concedes that there is no evidence in the record to indicate Hall preached about the gifting program to victims at regular church services where he presided as a pastor.

Most importantly, in determining whether Hall occupied a position of trust, we must focus on the relationship between Hall and the victims from the perspective of

the victims. *Garrison*, 133 F.3d at 837. Thus, Hall's status as a pastor and his involvement in the roadshows are only as significant as the victims indicate. It was the government's burden during sentencing, to show, by a preponderance of the evidence, that Hall occupied a position of trust with respect to his victims. *See United States v. Kummer*, 89 F.3d 1536, 1545 (11th Cir. 1996). However, instead of presenting any evidence to indicate that there was in fact a personal trust relationship between Hall and even one victim, the government relied solely on Hall's status as a pastor. During trial, the government called multiple victims as witnesses. None of these victims came to the roadshows for spiritual guidance; rather, all of them testified that they came to invest money, not because Hall was a pastor, but because they wanted to "double their money." The government did not even present evidence that Hall spoke of the gifting program to church members during regular church services, much less evidence that even one church member was a victim of his fraud. Now the government asks this Court to assume that at least one of the victims was a member of Hall's church and considered Hall to be his pastor. We decline to assume facts that the government had ample opportunity to establish during either trial or sentencing. When these victims decided to invest their money, they trusted that this was a legitimate investment program as represented by the directors, including Hall; however, this relationship between Hall and his victims is no different than the relationship that exists in every successful fraud. *See id.* at 838. With respect to the victims that the government presented, there was no personal trust relationship with Hall so as to place him in a position of trust under the Sentencing Guidelines, and therefore the two-level enhancement under U.S.S.G. § 3B1.3 was in error. We are

therefore obliged to vacate the sentence imposed and remand for resentencing.

AFFIRMED in part; REVERSED in part; Sentence Vacated and remanded for resentencing.